DAVID H. KRAMER, State Bar No. 168452
COLLEEN BAL, State Bar No. 167637
BART E. VOLKMER, State Bar No. 223732
CAROLINE E. WILSON, State Bar No. 241031
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

Attorneys for Defendant
YouTube, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT TUR d/b/a LOS ANGELES NEWS SERVICE, Plaintiff, v. YOUTUBE, INC., Defendant.	CASE NO.: CV 06-4436 FMC (AJWx) DECLARATION OF STEVE CHEN IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION OF DEFENDANT'S FIRST AFFIRMATIVE DEFENSE OF DMCA SAFE HARBOR Date of Hearing: Jan. 29, 2007 Time: 10:00 a.m. Court: The Honorable Florence-Marie Cooper

Schaffer
EXHIBIT NO. 16
DATE 1-23-08
Y.FENNELLY CSR5495

I, Steve Chen, declare as follows:

1. I was a co-founder of YouTube, Inc., which is now YouTube LLC (collectively "YouTube"), and currently serve as the company's Chief Technical Officer. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to them.

Background on YouTube

2. YouTube was founded in February 2005. At the time, the online sharing of personal photographs was quite popular, but there seemed to be no options for those who wished to share personal videos. My co-founders, Chad Hurley, Jawed Karim, and I decided to do something about this problem. Our aim was to create a service that would allow amateur users to share home-video clips simply and easily. The service would operate much like popular photograph-sharing services of the time such as snapfish.com and flickr.com. It would serve as an online repository or host, to which users could upload content that they wanted other users to be able to view. We chose the name "YouTube" to capture the idea that the service was designed for people who wanted to post their personal videos and broadcasts.

3. A beta version of YouTube's online service went live in April 2005. Accessible on the World Wide Web at www.youtube.com, the service allows users to upload short video clips to YouTube's computer servers. A user uploads a video clip by visiting YouTube.com, creating an account with us by filing out a registration form, and then selecting a video file to store on YouTube's servers. The content of each clip is entirely user-controlled, and YouTube does not charge users to upload clips.

4. When a user uploads a video clip, she assigns a title to the clip and chooses "tags," or keywords, to identify the video so that users searching the

service for particular types of clips can locate it. The choice of title and tags is entirely within the user's discretion. For instance, a surfing video might be tagged with "surfing," "water," and "waves" and be titled "Mike's 30th Birthday." The selection of tags and titles for a clip is entirely up to the user.

5. Once a clip is uploaded to YouTube, anyone with Internet access can search the YouTube website for videos of interest by entering a "query" consisting of "keywords" into our search engine. In response to the query, YouTube will show the user a page or pages containing single reduced-size still images ("thumbnails") from each of those clips matching the keywords for which the user searched. A user can then view a particular clip by clicking on its corresponding thumbnail image and visiting the "watch page" for that clip. YouTube does not charge users to view clips.

6. We had no idea when we launched the YouTube service just how popular it would become, or how fast it would grow. In the month of May 2005, only 35 video clips were uploaded to the service. In the month of December 2005, 237,000 video clips were uploaded to the service. In July 2006, over 2.1 million new video clips were uploaded to the service, and the service was accessed by 23 million unique visitors. Today, the service hosts more than ten million clips. An enormous number of these clips are home-made, original videos created by YouTube's users – the type of content YouTube was created to host. As *Time Magazine* explained in naming YouTube the "Best Invention of 2006," our users *invented* YouTube by posting home-made footage of all sorts, from stand-up routines, to video diaries, to delivery-room footage, to amateur musical performances, to eyewitness footage from Hurricane Katrina and the Iraq War. A true and correct copy of the *Time* article is attached to this declaration as Exhibit A.

7. We are continually amazed at the ways people have discovered to use YouTube to distribute their content to the world. By way of example only, we

have received campaign advertisements from countless politicians eager to have their messages reach millions of our users for free. Attached hereto as Exhibit B, is a message from Steve Westly's recent campaign for California Secretary of State regarding his advertisement, which is still available on the service at http://youtube.com/watch?v=OBU-iRBZhYA. John Edwards, the Democratic nominee for Vice-President in 2004, recently announced his candidacy for President in 2008 via YouTube, uploading a clip at http://www.youtube.com/watch?v=1etlZaf6zUw. Nancy Pelosi, the new Speaker of the U.S. House of Representatives, has her own page on the YouTube service (http://www.youtube.com/profile?user=NancyPelosi) through which her office regularly posts messages from Congressional representatives. The White House Office of National Drug Control Policy has posted a dozen anti-drug advertisements to the service (which have been viewed by tens of thousands of users (http://www.youtube.com/ondcp). We have also learned that Israeli and Lebanese citizens have regularly posted videos recorded from bomb shelters they had to occupy during the recent hostilities between the countries. (http://www.youtube.com/results?search_query=israel+bomb+shelters and http://www.youtube.com/results?search_query=lebanon+bomb+shelters). And law enforcement officials have repeatedly posted clips to the service seeking the public's help in identifying and locating criminal suspects whose faces can be seen in surveillance videos. The clips at http://youtube.com/watch?v=TwsIagFWKIY and http://youtube.com/watch?v=ryyNARnv5MA&mode=related&search= for example, were recently posted by the Franklin, Massachusetts police department. In my experience, for each remarkable example we actually learn about, there are invariably hundreds more that are available through our service.

8. YouTube continues to see and describe itself as "a consumer media company for people to watch and share original videos worldwide through a Web

experience." Our users control the content that is uploaded in exactly the same way that users of any other online hosting service – such as AOL Video, Yahoo! Video, Shutterfly, Kodak Photo Gallery, Blogger, Geocities, Flickr, Photosite, Microsoft Soapbox and many more – control the content they choose to upload and share with others through such online hosts.

9. To complement our user-supplied clips, YouTube has entered into numerous licensing arrangements with major copyright holders through which they too make their content available through YouTube to the world. For example, in October of this year, YouTube and CBS Inc. entered into an agreement under which CBS supplied hundreds of copyrighted news and entertainment clips to the YouTube service. In only a month's time, the clips had been viewed more than 30 million times by our users. According to the President of CBS Interactive in a recent press release attached hereto as Exhibit C:

> Professional content seeds YouTube and allows an open dialogue between established media players and a new set of viewers. We believe this inflection point is the precursor to many exciting developments as we continue to build bridges rather than construct walls.

The Executive Vice President of National Hockey League recently expressed similar views about the league's new relationship with YouTube in a release attached as Exhibit D:

> The partnership will enable the NHL to expose YouTube's vast audience to all of the excitement and drama of the new NHL. What a great way to showcase the talent of our athletes.

YouTube has entered into similar licensing arrangements with NBC, VH-1, MTV, as well as various record labels and movie studios all of whom have expressly requested and authorized YouTube to distribute their content.

through our service.

How YouTube Combats Copyright Infringement

10. As they do with any online service, a few of our users upload content to YouTube's service that they do not have the right to share. From the start, YouTube has respected and sought to protect the intellectual property rights of others. It has taken numerous affirmative steps to prevent the unauthorized uploading and viewing of copyrighted content. By way of example only, YouTube: (1) requires users to agree to terms of use that explicitly prohibit users from submitting copyrighted material that they do not have the right or authorization to post; (2) maintains a "Copyright Tips" page to help users determine if their post might be infringing; (3) reminds users, via three separate messages displayed each time they upload a clip, that they are prohibited from uploading copyrighted content unless they have the right or authorization to do so; (4) prevents users with standard accounts from uploading clips longer than ten minutes, thereby preventing the upload of longer-running copyrighted content such as feature-length films and television shows; (5) has registered an agent pursuant to the Digital Millennium Copyright Act ("DMCA"), and expeditiously removes allegedly infringing materials upon receipt of notification of their existence; and (6) terminates the accounts of users who are suspected of repeatedly infringing and restricts those users' ability to create new ones.

11. YouTube also offers content owners an electronic tool that enables them to easily identify videos on the service that allegedly contain their content and notify YouTube, under the DMCA, that they wish to have them removed. The tool enables content owners to run text searches and place check marks in boxes next to each of the search results for those videos they contend should be removed. The content owners then just click a button to send their notices and YouTube promptly removes the allegedly infringing clips. We refer to the availability of this

tool as the Content Verification Program, the details of which are available at http://youtube.com/t/copyright_program.

12. In addition to these structural and procedural measures, YouTube has deployed various technical measures aimed at preventing users from infringing the copyrights of others. For example, after YouTube receives a notice from a copyright holder requesting removal of specific clips from its service, we create a digital "hash" of the allegedly infringing content that we have been asked to remove. A "hash" is essentially a unique numeric value that is generated by analyzing the attributes of a specific clip. Once we have a hash for a clip that has been removed from the service for alleged copyright infringement, we thereafter prevent any user from uploading a clip with a hash that matches it. There are, however, limits to this technology, as it only detects exact matches. If a user changes the original clip in any way, such as by adding or removing blank frames to it, the hash for the modified clip will not match that of the original, and thus will not be recognized. In a similar fashion, YouTube is currently in the process of implementing state of the art technology that will create an audio fingerprint from clips identified as allegedly infringing, and can thereafter prevent users from uploading any clip containing a matching fingerprint. This filtering technology is cutting edge and more robust that the hashing technology mentioned above. Nonetheless, it may not detect every similar audio file uploaded.

13. YouTube has repeatedly received praise from copyright holders for its efforts to prevent and address alleged infringement occurring through the YouTube service. By way of example only:

- "Thank you for being so darn quick in removing the videos that infringe on our copyrights. You are incredible!!!!" – Ultimate Fighting Championships, or UFC
- "Thank you always your kind and rapid action against copyright

infringement. (removal of listed videos) I (we) appreciate it very much!"- NHK Japan Broadcasting Corporation

- "Thank you very much for responding to our request to remove the copyright material so quickly. It is good to see a file-sharing website taking such a responsible approach and hopefully many others will follow your exemplary model." – Token Artists, Australia

Copies of these letters are attached to this Declaration as Exhibit E.

14. Despite its substantial efforts to prevent copyright infringement by others through its service, YouTube simply does not have the ability to control all of the clips uploaded and accessed through its service. Today, users upload more than 100,000 clips per day, and in October 2006 alone, 23.5 million unique users came to our service to view clips. If a YouTube user chooses to upload a clip that successfully passes through our filters, the clip becomes available for other users to view.

15. YouTube does not manually screen videos before they are made available through the service. To do so would be prohibitively expensive (and result in substantial delays) given the volume of user submissions. Moreover, no matter what manual screening process was employed, YouTube could not determine whether a particular user had the right to upload a particular clip. We are in no position to know who the copyright holder is for a particular clip or whether a clip is even subject to copyright protection. For those clips that are copyrighted, we do not know whether the copyright holder is the uploader or has authorized the uploading, whether expressly or impliedly. And YouTube is not in a position to make determinations as to whether an upload is otherwise permitted by any of the various provisions of copyright law, such as the doctrine of fair use.

16. The impossibility of this sort of manual screening is highlighted by the numerous examples of major copyright holders and advertisers uploading clips

to the service without notifying us that they have done so. Stories about such "stealth" marketing campaigns are too numerous to mention, but include for example, uploads from BSkyB, Wendy's Hamburgers, Universal Music, Sony and Nike and many, many more as described in the articles attached hereto as Exhibit F.

17. Just as YouTube cannot manually pre-screen content, there is no technology that YouTube could deploy that could identify all of the copyrighted material in existence and screen every clip a user seeks to upload for the presence of such material. Even if such screening technology were possible, YouTube would again have no way to determine whether the user seeking to share the particular clip had the right to do so.

18. Given the practical limitations we face, YouTube does what is reasonable: we contractually require the uploader to represent that he or she has the rights to make a clip available to others, we repeatedly warn users about the consequences of unauthorized uploads including in the upload process, we make it as easy as possible for copyright holders to notify us, and we implement those technological filters that are available to us. Beyond this, YouTube relies on copyright holders to notify it of the presence of unauthorized, allegedly infringing material that is accessible through our service. Once we are notified of the existence and location of allegedly infringing material, YouTube acts promptly to block access to or remove it from its service.

Advertising that Appears on YouTube

19. As noted, YouTube does not charge users a fee either for uploading or viewing clips. Rather, YouTube earns revenue through the display of banner advertising on pages throughout our website. At various times, ads have appeared, for example, on our homepage, on pages displaying thumbnail images of clips responsive to users' search queries, on pages displaying the most popular (or

highest rated) clips for the day, and on "watch pages" (i.e. the pages at which users view individual clips).

20. The banner advertising that YouTube displays is virtually never targeted to the content of a specific clip. That is, the ads shown to users of the service, including on the pages at which users may view clips, are selected without regard to the clip appearing on that page. There are rare exceptions to this approach, where an advertiser wishes to show an ad in connection with a clip that the advertiser itself has supplied (Nike, for example, once displayed an advertisement on YouTube that was targeted to a clip Nike itself posted of a Brazilian soccer star making a miraculous play). But except for such unusual circumstances, the ads that YouTube shows (and has shown in the past) are not in any way tied to the content of the clip available for viewing on the page where an ad appears. Put differently, for purposes of displaying advertising, YouTube treats all clips as equal.

21. YouTube has utilized at least two different types of banner advertisements in its existence. The substantial majority of the advertisements shown on YouTube have been Cost-Per-Click ("CPC") ads. With a CPC ad, an advertiser pays nothing for having its advertisement displayed to users. Instead, the advertiser pays only if a user demonstrates his or her interest in the matter being advertised by taking the step of "clicking" on the ad when it is displayed.

22. To the extent we display a CPC advertisement on a "watch page," a user can certainly view their selected clip without clicking on the ad, and thus can view the clip without generating any revenue for us. By the same token, a user can click on the ad at any time while the clip is playing, long after the clip has played, or if the clip fails entirely to play, which could happen for any number of reasons (e.g., the user's browser was not configured properly, there was some technical failure on our site, there was a problem with the user's service provider). Our

revenue, if any, from a particular advertisement is independent not only from the content of a particular clip, but from the actual viewing of the clip as well.

23. YouTube has also occasionally used another type of advertising under which advertisers pay YouTube each time their ad is shown, whether or not the user clicks on the ad. Each showing of the ad is referred to as an "impression." Like our CPC ads, these "CPM" (for cost-per-mille or cost per thousand impressions) ads can be shown on pages throughout the site.

24. As with CPC ads, YouTube's revenue from CPM ads is independent from both the content of a particular clip, and the viewing of that clip. To the extent CPM ads are shown on watch pages, the ad is displayed not because the user has selected a particular clip, but simply because the user has requested to visit *some* page within our web site. It is quite possible that the user would have seen the same ad regardless of what clip the user requested, or if the user requested to visit the YouTube homepage instead of viewing a clip at all. In addition, even on watch pages, CPM ads are displayed whether a clip actually loads, whether it is actually viewed and whether the user stops the clip immediately or at any point thereafter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed the 5th day of January, 2007, at San Bruno, California.

Steve Chen